BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
WASHINGTON, D.C. 20554

In the Matters of	)	
	)	
Applications of AT&T Inc. and	)	WT Docket No. 11-65
Deutsche Telekom AG for Consent to	)	DA 11-799
Assign or Transfer Control of Licenses	)	ULS File No. 0004669383
and Authorizations	)	
	)	
Application for Assignment of Lower 700 MHz	)	WT Docket No. 11-18
Band Licenses from Qualcomm Incorporated	)	DA 11-252
To AT&T Mobility Spectrum LLC	)	ULS File No. 0004566825
	)	
Applications for Assignment of Licenses from	)	ULS File Nos. 0004544863 and
Whidbey Telephone Company to AT&T	)	0004544869
Mobility Spectrum LLC	)	
	)	
Application for Assignment of License from	)	ULS File No. 0004621016
700 MHz, LLC to AT&T Mobility Spectrum	)	
LLC	)	
	)	
Application for Assignment of License from	)	ULS File No. 0004635440
Knology of Kansas, Inc. to AT&T Mobility	)	
Spectrum LLC	)	
	)	
Application for Transfer of Control of	)	ULS File No. 0004643747
Redwood Wireless Corp. to AT&T Inc.	)	
	)	
Application for Assignment of License from	)	ULS File No. 0004681773
Windstream Lakedale, Inc. to AT&T Mobility	)	
Spectrum LLC	)	
	)	
Application for Assignment of Licenses from	)	ULS File No. 0004681771
Windstream Iowa Communications, Inc. to	)	
AT&T Mobility Spectrum LLC	)	
	)	
Application for Assignment of License from	)	ULS File No. 0004699707
Maxima International, LLC to AT&T Mobility	)	
Spectrum LLC	)	
	)	
Application for Assignment of Licenses from	)	ULS File No. 0004448347
D&E Investments, Inc. to new Cingular Wireless	)	
PCS, LLC	)	
	)	

OPPOSITION TO JOINT MOTION TO CONSOLIDATE

700 MHz, LLC ("Licensee"), through counsel and pursuant to Section 1.45 of the Commission's rules, 47 C.F.R. § 1.45, hereby urges the Commission to summarily dismiss the Motion[1] submitted in the captioned proceeding. As demonstrated below, the Motion is procedurally defective and substantively bereft of merit.

I. BACKGROUND

Over the last six months, AT&T Mobility Spectrum, LLC, or an affiliate (collectively, "AT&T"), has been a party to two truly large scale acquisitions.[2] It has also been a party to several very small-scale, essentially run-of-the-mill spectrum acquisition transactions. License is the proposed assignor in one such very small transaction.[3]

The signatories to the Motion, or a core group thereof (the "Petitioners"), challenged each of the AT&T/T-Mobile and AT&T/Qualcomm transactions, as did many others. For the most part, Petitioners in those very large AT&T application proceedings presented the Commission with issues that the Commission, as the communications agency primarily charged with reviewing those applications, must address prior to acting on the applications. While the great majority of entities that challenged the AT&T/T-Mobile and AT&T/Qualcomm transaction focused properly on those "game changer" applications, Petitioners have recently abandoned such reasonableness and instead applied a more helter-skelter, shotgun approach premised upon requested consolidation.

[1] See "Joint Motion to Consolidate" submitted on June 9, 2011, by Sprint Nextel Corporation ("Sprint"); the Rural Telecommunications Group, NTELOS; Cincinnati Bell Wireless, LLC, MetroPCS Communications, Inc., and the Rural Cellular Association. Collectively, these are the "Petitioners". The Motion urges the Commission to "consolidate its review" of the captioned applications.

[2] See the first two named applications in caption hereof, which caption was included on the Motion. The first of these is the "AT&T/T-Mobile" transaction and the second is the "AT&T/Qualcomm" transaction.

[3] In the transaction involving Licensee, only one 12 MHz license is at issue.

II. ARGUMENT

A. The Motion is Procedurally Defective on Several Counts

Perhaps the most striking aspect of the Motion is the contempt with which the Petitioners treat the Commission and its rules. They brazenly ignored codified rules, established case precedent and Commission directives in recently issued public notices announcing the filing of many of the captioned applications. To be clear, by urging the Commission to group together individual proceedings that previously had not been challenged, with ones that have been challenged, the Petitioners have effectively sought the same type of relief that should have been included in a petition to deny.

Unless the Commission recognizes these failings and dismisses the Motion outright, Petitioners will achieve the mischief they seek – delay. Moreover, if the Commission here ignores its own rules or delays in enforcing them, it would be practically impossible for the Commission to enforce its same rules and policies in any other proceeding.[4] Most certainly, if the Commission were to entertain the Motion, then attempt to enforce its procedural rules in other proceedings, the legitimacy of those later rulings would be seriously jeopardized. In addition, the Commission's position as a neutral and objective decision maker would be irreparably tarnished in the eyes of the public.

1) The Motion is Late-Filed

The Motion is dated June 9, 2011. That date is later than the filing date formally established by the Commission in the proceeding involving Licensee's application, and in most of the other small application proceedings set forth in the caption to the Motion. With few

[4] See, e.g., *Melody Music, Inc. v Federal Communications Commission*, 345 F. 2d 730, 732 (D.C. Cir. 1965), where Judge Bazelon explained that when the Commission treats entities differently it must explain its reasons and do more than enumerate factual differences, if any, between appellant and the other cases; it must explain the relevance of those differences to the purposes of the Federal Communications Act.

exceptions, none of which relate to Licensee, the Motion is the first adverse submission presented against the applications. Notwithstanding the lack of timeliness, no excuse or request for waiver was presented anywhere in the Motion. In the absence of any excuse or waiver request accompanying the Motion, the Commission should dismiss it as being late filed. See e.g., the Commission's *Public Notice in WT Docket 11-65, rel. April 28, 2011 (the "PN")* where the Commission expressly warned parties that, if they want to present argument in that proceeding, they had better do it by virtue of a timely Petition. And if they don't do it by that time, they cannot raise new argument later. See PN, at 3-4. Yet, that is precisely what Petitioners are here doing. If the Commission meant what it said in the PN, it must promptly reject the Motion.

2) Several of the Signatories Have No Standing

Significantly, the Petitioners formed no entity, formally or informally, to submit the Motion. Rather, six individual entities submitted the Motion. Each apparently sought party status. Each did so without making any argument regarding standing. Review of Commission records reflects that some or all of the signatories have no tie to the geographic market in which Licensee is licensed and therefore could not establish standing. Those parties should be stricken from the proceeding.

The standing issue here is of more than theoretical significance. Nowhere in the Motion is any argument presented with respect to the bona fides of Licensee's application. Substantively, that is hardly surprising as the Petitioners generally have no interest or information regarding Licensee's market at issue, and there is nothing about Licensee's transaction that warrants concern. Licensee has been inappropriately added to this proceeding only as a means of Petitioners strengthening their leverage in the two largest of the captioned application proceedings. It is just this type of situation that contributed to the development of the

doctrine of standing. And that doctrine is designed in large part to avoid parties who have no legitimate interest in a particular proceeding from bringing action in it.

This standing defect both presents an independent basis for summary dismissal and further demonstrates the contempt that the Petitioners have directed to the Commission and its processes. The Commission should not condone such antics, as it would do by entertaining the Motion. And if it does effectively condone them here, it will open the door for more of the same in other proceedings.

3) The Commission Should Apply its Rules and Dismiss the Motion Immediately

Oftentimes there is a tendency to downplay the significance of procedural rules and to view them as controls that can be enforced or ignored at the election of the responsible agency involved. That is not the case, particularly where the FCC is concerned. The D.C. Circuit has spoken directly and clearly on this point, and enunciated the self-evident proposition that the Commission must enforce the rules that it adopts. *Reuters Ltd. V. FCC*, 781 F. 2d 946 (D.C. Cir. 1986) ("Reuters").

In Reuters procedural filing and eligibility to participate rules were at issue, just as they are here. There, like here, a party filed late and the question arose as to whether that late filing could simply be overlooked by the Commission. In holding that the Commission could not simply choose not to enforce its own rules, Judge Starr explained:

> It is elementary that an agency must adhere to its own rules and regulations. *Ad hoc* departures from those rules, even to achieve laudable aims, cannot be sanctioned, *Teleprompter Cable Systems v. FCC*, 543 F. 2d 1379, 1387 (D.C. Cir. 1976), for therein lie the seeds of destruction of the orderliness and predictability which are the hallmarks of lawful administrative action. Simply stated, rules are rules, and fidelity to the rules which have been properly promulgated, consistent with applicable statutory requirements, is required of those to whom Congress has entrusted the regulatory missions of modern life.

Reuters, at 950. All of Judge Starr's ruling are applicable here.

For all of the foregoing reasons, the Commission must promptly dismiss the Motion.

B. There is No Legal or Factual Basis for the Relief Petitioners Seek

1) The Petitioners' Request is at Odds With the Commission's Rules Governing Consolidation

Section 1.227 of the rules, 47 C.F.R. § 1.227, governs motions to consolidate. Notably, it is set forth in a portion of the rules entitled "Hearing Procedures". Also, it expressly provides that consolidation may be appropriate where applications are mutually exclusive. 47 C.F.R. §1.227(b)3 and (b)(4).

Here, there is no mutual exclusivity. And for Licensee, there is no hearing or request for hearing. So there is really nothing to consolidate. Where the Commission has been faced with this type of factual setting in other instances, it has properly held that consolidation is not appropriate. See, e.g., *Applications for Consent to the Transfer of Control of Licenses & Section 214 Authorizations from MediaOne Group, Inc. to AT&T Corp.,* Memorandum Opinion and Order, CS Dkt No. 99-251, 15 FCC Rcd. 9816, 9893, ¶ 181 (2000) ("MediaOne/AT&T Order"). There, the Commission properly held that the party requesting consolidation

> "has not established that the Commission's grant of the AT&T-MediaOne and AOL-Time Warner license transfer applications are mutually exclusive as a matter of law, such that approval of one application would necessarily preclude approval of the second application."

The Commission also properly noted that "[U]nder Section 309(a) of the Communications Act the Commission determines "in the case of each application filed with it . . . whether the public interest, convenience and necessity will be served by the granting of such application" Id, at n. 499 (emphasis added), citing 47 C.F.R. §309(a) and *R.J. Mohr, d/b/a Radio Call, 85 F.C.C. 2d 596 (1981).*

2) There are Numerous Important Differences in the Applications that Argue Against Consolidation

At the core of the protests by Petitioners of both the AT&T/T-Mobile and AT&T/Qualcomm applications is a single fundamental issue: size. See, e.g., the petition filed by Sprint, where it emphasized repeatedly the $39,000,000,000.00 valuation and nationwide character of the AT&T/T-Mobile transaction numerous times. That size issue is relevant for several reasons. First, the numbers themselves make that one of the largest telecommunication merger ever! Second, it arguably provides the transferee with enhanced market strength, thereby making more possible anti-competitive activity that would lead to harm to the industry. In addition, it arguably undermines entirely the theme of competition, with all associated benefits, that the Commission has properly recognized and encouraged countless times over the last several decades.

The proceeding involving Licensee stands in absolute contrast. Rather than being national in scope, as are both the AT&T/T-Mobile and AT&T/Qualcomm transactions, the proceeding that involves Licensee includes only a single license in a single market. In fact, it is only one of 734 CMAs.

Insofar as valuation is concerned, and without disclosing any confidential information, the Licensee transaction valuation is a very small fraction of either the AT&T/T-Mobile or AT&T/Qualcomm valuations.

Equally important is the contested nature of some, but not many, of the captioned applications. Review of the FCC records reflects that a large number of parties opposed the AT&T/T-Mobile transaction and the AT&T/Qualcomm transaction. In contrast, no one raised <u>any</u> objection, either formal or informal, against the application involving License.

The contested/uncontested status of the proceedings sought to be consolidated is particularly relevant here, for two principal reasons. First, insofar as Licensee is concerned,

there really is no proceeding to consolidate. (See Section 1.227 of the rules, noted above, explaining that the Commission's rules contemplate motions to consolidate only in the context of hearings.) Second, by their very nature, contested applications are on a very different time-track than are uncontested ones. Where parties have properly challenged applications, the facts and law presented have to be analyzed and decisions must be written. And in the case of both AT&T/T-Mobile and AT&T/Qualcomm, due to their size, a number of issues must be addressed in the decisions to be written. All of this takes time – and in these cases lots of time. Were the Commission to either grant or hold in abeyance the Motion, Licensee would be an unintended victim of delay. More importantly, its license would lie fallow for the entire delay period.

Lastly, it is important to appreciate that the applications at issue are very different in a number of additional ways. Two of the transactions are national in scope, the others are not, and Licensee's application involves only a single license in a single market. The assigning or transferring parties are different in virtually all applications. Despite Petitioners' labeling them as "Serial 700 MHz Applications", each of the transactions is very different in nature, scope and objectives. In this regard, it bears noting that these are individual deals involving different parties, different counsel, different time frames, different terms and widely different markets. As the Commission has previously acknowledged there is no basis for consolidation where independent entities just "happen to have entered into agreements with the same party . . . but the agreements involve different business terms, are structured differently, and are neither interrelated nor dependent one another". *Applications of Nextel Communications, Inc. for Transfer of Control of OneComm Corporation, N.A. and C-Call Corp.,* 10 FCC Rcd 3361, 3363 (1995) (the "Nextel Application"); citing *Comcast Contel, 2 FCC Rcd 7202 (1987),* for the proposition that when one party enters into different agreements with other parties, and neither is

conditioned upon consummation of the other, the Commission will consider each application separately.

Given the vast array of differences, there would be no material benefit to consolidation. Indeed, the added complexity that all of these differences would bring to any single proceeding would vastly complicate resolution of relevant issues. Most certainly, consolidation would not "best conduce to the proper dispatch of business and to the ends of justice", which is the over-arching standard for consolidation as set forth in 47 C.F.R. § 1.227.

3) The Commission Has Repeatedly Declined to Consolidate Proceedings in Situations Such As This One, and Should Do So Here

Fortunately, this is not an issue of first impression, and is one where there is an established line of authority that mandate dismissal or denial of the Motion. Both the Comcast and Nextel cases discussed above clearly support that end.

More recent Commission discussions involving the same issue have led to the same result – denial of a motion to consolidate. Specifically, in the case of Comcast's acquisition of CIMCO, the Commission addressed the negative aspects of the delay that is inherent in consolidation and held that:

> We agree with the Applicants that the transaction involving CIMCO and Comcast is unrelated to the proposed transaction involving NBC and Comcast. Any potential public interest harms or benefits related to the proposed transaction involving NBC and Comcast may be raised in the course of the Commission review of that transaction. Delaying our decision on the present transaction until the Commission completes its review of the NBC/Comcast transaction would unnecessarily burden CIMCO and Comcast and delay the likely benefits of the instant transaction, and would not inform our review of the transaction involving Comcast and NBC.

Applications Filed for the Acquisition of Certain Assets of Cimco Communications, Inc. by Comcast Phone LLC, Comcast Phone of Michigan, LLC and Comcast Business

Communications, LLC, Memorandum Opinion and Order and Order on Reconsideration, WC Dkt. No. 09-183, 25 FCC Rcd. 3401 at n.16 (2010) (citations omitted).

Licensee is cognizant that Petitioners have also submitted a motion to consolidate the two largest captioned transaction proceedings. There, Petitioners attempted to show that consolidation would be appropriate in limited situations. Yet, in so doing Petitioners succeeded only in demonstrating that consolidation is certainly not appropriate in proceedings of this nature. One of the primary cases that Petitioners relied upon to attempt to support their position is aptly entitled *"Forty-one Late-Filed Applications for Renewal of Educational Broadband Service Stations.*[5] As the case name implies, the otherwise non-controversial applications shared a single, critical legal issue (being late-filed), and that fact is what caused the Commission to elect, on its own motion, to treat all of them together. Thus, that case has little relevance to this proceeding, given the numerous factual and other differences separating the applicants.

The next case that Petitioners cited in their previous motion to consolidate proceeding is *British Telecommunications,* 17 FCC Rcd 3643 (2002). But that case also has no relevance here. For as the Commission properly explained, there the Commission acted upon several applications, all of which were submitted "in connection with the unwinding of the concert global joint venture between AT&T and BT", who were also the parties to the applications there at issue. Thus, it was the absolutely close bond among the applications, coupled with complete sameness of parties, that warranted consolidation. As demonstrated above, those factors are simply not here present. Thus, the BT case in no way supports consolidation here.

[5] *Forty-one Late-Filed Applications for Renewal of Educational Broadband Service Stations*, 22 FCC Rcd 879 (Wire Tel. Bur., 2007).

The third case [6] cited by Petitioners in their prior motion constitutes a "third strike" insofar as providing any support for consolidation here. To start with, the Commission explained that the two applications (not several, as is here the case) were being acted upon in concert because "these transactions are closely related". *Id, at 5468.* That same closeness is not here present, and the Solar case thus offers no support for consolidation here.

In sum, Petitioners cited "authority" does not lend any support to their position in this proceeding. Where the Commission has "consolidated" non-hearing, non-mutually exclusive cases, it has in actuality simply acted on applications at the same time. There has been no true "consolidation. And even this was done *sua sponte*. Moreover, the Commission is more than capable of factoring into account the impact (if any) of one acquisition when ruling on any further ones. So there is no material benefit to consolidation.

III. CONCLUSION

The Motion is distasteful. Yet, it is most susceptible to prompt resolution. The statute, the code; the precedent; and the facts all support – indeed require – the Commission to promptly dismiss the Motion and to review Licensee's application on its own merits.

Respectfully submitted,

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June 22, 2011

[6] Solar Broadcasting Company, Inc. 17 FCC Rcd 5467 (2002)

CERTIFICATE OF SERVICE

This is to certify that on this 22nd day of June, 2011, the foregoing Opposition to Joint Motion to Consolidate was filed with the Federal Communications Commission's Executive Secretary, and a copy of same was served upon all persons listed below as follows:

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